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No. 02-1590

In the Supreme Court of the United States

MOUNTAIN STATES LEGAL FOUNDATION, ET AL.,
PETITIONERS

v.

GEORGE W. BUSH,
PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Petitioners have challenged six presidential proclamations designating specified tracts of federal land as national monuments. In issuing those proclamations, the President acted pursuant to the Antiquities Act of 1906, which authorizes the President, "in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" situated upon federal land "to be national monuments." 16 U.S.C. 431. The question presented is as follows:

Whether the court of appeals correctly held that petitioners had failed adequately to preserve their current claim that the challenged proclamations did not comply with the criteria set forth in the Antiquities Act of 1906.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 306 F.3d 1132.

JURISDICTION

The judgment of the court of appeals (Pet. App. 14-15) was entered on October 18, 2002. A petition for rehearing was denied on January 30, 2003 (Pet. App. 32-33). The petition for a writ of certiorari was filed on April 30, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Antiquities Act of 1906 (Antiquities Act or Act), 16 U.S.C. 431 *et seq.*, confers authority upon the President to set aside federal lands to be managed as national monuments. The Act provides:

> The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

16 U.S.C. 431. The Antiquities Act contains no provision for judicial review.

2. In the years 2000 and 2001, President Clinton issued proclamations establishing the six national monuments challenged in this case: the Grand Canyon-Parashant National Monument, the Ironwood Forest National Monument, and the Sonoran Desert National Monument in Arizona; the Canyons of the Ancients National Monument in Colorado; the Cascade-Siskiyou National Monument in Oregon; and the Hanford Reach National Monument in Washington. Pet. App. 3-4. Each of the proclamations identified objects of historic or scientific interest to be protected. *Id.* at 56-97. Each proclamation specifically stated that the land set aside is "the smallest area compatible with the proper care and management of the objects to be protected." *Id.* at 62, 69, 75, 82, 88, 94.

3. Petitioners filed suit in federal district court, alleging that President Clinton's designation of each of the monuments was *ultra vires* because the Property Clause (U.S. Const. Art. IV, § 3, Cl. 2) gives Congress sole power to dispose of and make rules and regulations respecting federal property. See Pet. App. 51-54. President Clinton, in his official capacity as President, was the sole defendant named in petitioners' complaint. *Id.* at 35. The complaint asked that the challenged proclamations be declared null and void and that the lands encompassed within the designated areas be returned to the management regimes that were in place before the designation of the monuments. *Id.* at 54.

The district court dismissed the complaint for failure to state a claim. See Pet. App. 16-17. In its oral ruling, the court explained that petitioners' constitutional claims lacked merit because the President had acted pursuant to a valid statutory grant of authority that established "intelligible principles" to cabin the President's discretion. See *id.* at 20-21, 27. The court further observed that the proclamations on their face were consistent with the standards contained in the Antiquities Act. *Id.* at 27. Under those circumstances, the court found it inappropriate "to engage in fact-finding as to exactly how many acres would have been the smallest area compatible with the proper care and management of the objects to be protected, for example, or whether or not these were historic landmarks, historic and prehistoric structures and other objects of historic or scientific interest." *Ibid.* The court also explained that "in looking at whether a complaint should be dismissed on failure to state a claim * * * one has to look at the face of the complaint." *Id.* at 30. "[H]aving looked at the amended complaint," the court concluded that petitioners "really ha[ve]n't made

factual claims that should require a trial and discovery. [They] did make constitutional claims." *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-13.

The court of appeals observed that the only theory of liability set forth in petitioners' complaint was "that the six Proclamations at issue exceed the President's authority under the Property Clause and are therefore 'unconstitutional and *ultra vires*.'" Pet. App. 9. The court held that petitioners could not establish a Property Clause violation because "the President exercised his delegated powers under the Antiquities Act, and that statute includes intelligible principles to guide the President's actions." *Id.* at 9-10. The court also rejected petitioners' alternative contention, not included in their complaint but subsequently raised during briefing and argument in the district court, that only "rare and discrete man-made objects, such as prehistoric ruins and ancient artifacts," are eligible for designation as "national monuments" under the Antiquities Act. *Id.* at 10. The court explained that petitioners' argument "fails as a matter of law in light of Supreme Court precedent interpreting the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." *Ibid.* (citing *Cameron* v. *United States*, 252 U.S. 450 (1920)).

Finally, the court found that "to the extent that [petitioners] seek[] *ultra vires* review under the Act, [their] complaint and statutory arguments present no more than legal conclusions." Pet. App. 10. The court explained:

> To warrant further review of the President's actions, [petitioners] would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act. Having

> failed to do this, [petitioners] present[] the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority. The inadequacy of [petitioners'] assertions thus precludes [them] from showing that the district court erred in declining to engage in a factual inquiry to ensure that the President has complied with the statutory standards.

Id. at 11 (citations omitted).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The sole defendant named in petitioners' complaint was the President of the United States in his official capacity. See Pet. App. 35. This Court's decisions strongly indicate that courts lack authority to award declaratory or injunctive relief against the President. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 825-829 (1992) (Scalia, J., concurring in part and concurring in the judgment). In any event, the President is not an "agency" subject to suit under the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, see *Franklin*, 505 U.S. at 800-801 (opinion of the Court); the Antiquities Act contains no judicial review provision; and petitioners identify no other provision of law that purports to authorize the filing of a suit against the President under the circumstances presented here. Thus, whatever the appropriate scope of review might be in a suit against an appropriate defendant (*e.g.*, a subordinate Executive Branch official charged with managing the public lands in question), the unavail-

ability of judicial process to compel or prohibit the President's performance of an official act provides an independent ground for dismissal of petitioners' suit and denial of certiorari.

2. Petitioners' complaint asserted a single claim with respect to each of the six monuments at issue: that the President acted *ultra vires* and unconstitutionally because the Property Clause vests in Congress the sole authority to make rules and regulations respecting federal property. See Pet. App. 51-54. As the court of appeals correctly explained, that claim fails because the President, in designating the national monuments at issue here, exercised power conferred by Congress in the Antiquities Act. *Id.* at 9-10. The Act authorizes the President to identify "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" located upon federal land, and it directs that the designated area "be confined to the smallest area compatible with the proper care and management of the objects to be protected." 16 U.S.C. 431. The Act thus "includes intelligible principles to guide the President's actions." Pet. App. 10; see *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 474 (2001).

3. Petitioners contended on appeal that the President's authority under the Antiquities Act is limited to the protection of man-made objects, and that the six monuments at issue here were invalidly designated because they were created at least in part to protect natural objects. See Pet. App. 10; Pet. C.A. Br. 31-41. The court of appeals correctly rejected that contention, observing that this Court has repeatedly "interpret[ed] the Act to authorize the President to designate the Grand Canyon and similar sites as national monuments." Pet. App. 10. In upholding President

Theodore Roosevelt's creation under the Antiquities Act of the 800,000 acre Grand Canyon National Monument in Arizona, this Court explained:

> The Act under which the President proceeded empowered him to establish reserves embracing "objects of historic or scientific interest." The Grand Canyon, as stated in his proclamation, "is an object of unusual scientific interest." It is the greatest eroded canyon in the United States, if not in the world, is over a mile in depth, has attracted wide attention among explorers and scientists, affords an unexampled field for geologic study, is regarded as one of the great natural wonders, and annually draws to its borders thousands of visitors.

Cameron, 252 U.S. at 455-456; accord *Cappaert* v. *United States*, 426 U.S. 128, 141-142 (1976); *United States* v. *California*, 436 U.S. 32, 34 (1978).

4. Thus, the court of appeals considered and squarely rejected petitioners' contentions that (a) the presidential proclamations at issue here were barred by the Property Clause, and (b) the Antiquities Act authorizes protection only of man-made objects. The only claim that the court declined to adjudicate on the merits was petitioners' contention (see Pet. C.A. Br. 12-31) that the President had abused the discretion conferred upon him by the Antiquities Act when he determined that the designated national monuments satisfied the statutory criteria. The court of appeals held that it need not "decide the ultimate question of the availability or scope of review for exceeding statutory authority" under the Antiquities Act because petitioners had not adequately pleaded such a claim in their complaint. Pet. App. 11.

That holding is correct. As this Court has recognized, "an ultra vires claim rests on 'the officer's lack of delegated power. A claim of error in the exercise of that power is therefore not sufficient.'" *Pennhurst State Sch. & Hosp.* v. *Halderman*, 465 U.S. 89, 101 n.11 (1984) (quoting *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 690 (1949)). In alleging that President Clinton had "acted unconstitutionally and *ultra vires*" because the Property Clause vests Congress with power over federal lands, see Pet. App. 51-54, petitioners did not place the federal government on notice that they were disputing the President's judgment that the challenged monuments satisfied the relevant statutory criteria.

Even if petitioners had timely pleaded a claim that the President abused his discretion in applying the Antiquities Act standards to the designations at issue here, petitioners would not be entitled to judicial review of that contention. Even as a general matter, waivers of sovereign immunity must be express, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), and there is no waiver of sovereign immunity for such a claim. But in addition, "[o]ut of respect for the separation of powers and the unique constitutional position of the President," this Court "would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion." *Franklin*, 505 U.S. at 800-801; accord *Dalton* v. *Specter*, 511 U.S. 462, 474 (1994) ("[W]here a claim concerns not a want of Presidential power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power.") (brackets and internal quotation marks omitted); *United States* v. *George S. Bush & Co.*,

310 U.S. 371, 380 (1940) (application by the President of a statutory standard to a particular set of facts "is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment").* Neither the Antiquities Act nor any other federal statute authorizes abuse-of-discretion review of the President's designation of national monuments under the Act. Petitioners' abuse-of-discretion claim therefore would not be justiciable even if it had been pleaded in a timely and adequate manner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 2003

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* Petitioners' reliance (Pet. 14-16) on such cases as *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667 (1986), is therefore misplaced. Those cases do not involve abuse-of-discretion challenges to decisions entrusted by statute to the President. As *Franklin* and *Dalton* confirm, the presumption with respect to such claims is *against* judicial review, not in favor of it.